

The Yellow Dog Contract

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EDITORIAL COMMENT

The Yellow Dog Contract

Last April when President Hoover named Judge Parker as the successor of the deceased Judge Sanford upon the Supreme Court bench, he provoked an unexpectedly bitter struggle in the Senate, a struggle which lasted for weeks and ended in Judge Parker being defeated by a margin of two votes. Intelligent, popular, and well versed in law, he, nevertheless, was defeated because his attitude toward the Yellow Dog Contract, as displayed in the Red Jacket Coal Company case, was regarded as indicating a lack of a progressive, sociological view of law.

The Yellow Dog Contract has occupied the attention of our courts for over thirty-five years, and yet, a surprising number of members of the legal profession does not know even what a Yellow Dog Contract is. A Yellow Dog Contract is a contract of employment in which the employee promises either that he will not join a labor union during his term of employment or that he will withdraw from such employment in case he does join a labor union. These contracts enjoy a wide use in our modern industrial system, being used in all parts of this country and most industries, especially in the coal mining industry where they are used in nearly all the non-union fields. In Wisconsin a law was passed in 1929 declaring these contracts void, (103.42) and it was partly upon this law that Governor Kohler based his plea for renomination in the primary last September. In this paper I purport, first, to discuss the general legal status of the Yellow Dog Contract and, second, to discuss legislation passed forbidding the Yellow Dog Contract, especially the Wisconsin Law.

Felix Frankfurter in his most recent book, "The Labor Injunction" states that, "All law is a compromise between the past and present, between tradition and convenience." This is particularly true of the law relating to the Yellow Dog Contract. There are two conflicting views, the old and the new and two conflicting lines of cases, one which closely adheres to the Common Law in insisting upon absolute freedom of contract for employers and the other which disregards the Common Law and limits the right of freedom of contract wherever it seems to encroach upon other basic human rights. In other words one is based upon the fundamental assumption that the power to bargain collectively is optional and can be signed away and the other upon the fundamental assumption that the power to bargain collectively cannot be waived, but is a power which is vitally essential to the security and happiness of the workman.

The earlier cases held the Yellow Dog Contract to be absolutely legal. *State vs. Julow*, 129 Mo. 163 (1894), *Kreutzberg vs. State*, 114 Wis. 530, (1902), and *People vs. Marcus*, 185 N. Y. 257, (1906), held that state laws making it a criminal offense for employers to hire their employees on Yellow Dog Contracts are violations of the employers right of freedom of contract and are unconstitutional. These decisions of the state courts were upheld by the Supreme Court in the test case, *Coppage vs. Kansas*, 236 U. S. 1, and *Adair vs. United States*, 208 U. S. 162, went a step farther in holding that a federal statute forbidding carriers engaged in interstate commerce from hiring employees on Yellow Dog Contracts is unconstitutional.

In the case *Hitchman Coal Company vs. Mitchell*, 245 U. S. 229 (1907), the Supreme Court not only held Yellow Dog Contracts to be legal, but also granted an injunction restraining union organizers from persuading those employees of the plaintiff working under Yellow Dog Contracts to break their contracts and join the union. The court said: "The same liberty which enables men to form unions and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case as in the former the parties are entitled to be protected by the law in the enjoyment of the benefits of any legal agreement they may make."

According to this case, the employee could break his contract of his own accord, but no person not a party to the contract could approach him and persuade him to take such a step. This decision placed a powerful weapon in the hands of the employer, for by hiring his employees on Yellow Dog Contracts he could prevent union organizers from even approaching them, thus keeping them free from all union influence. The practical consequence of this decision is exemplified in the present conditions in the coal mining industry. The union mine owners of Pennsylvania pay their men a low wage in order to compete with the non-union mines of West Virginia. If the union miners strike, the non-union miners will work overtime to supply the new demand created by the strike, the profits which belong to the union miners will go to the non-union miners, and the chances are great that the strike will fail in procuring the end for which it was declared.

United Mine Workers of America vs. Red Jacket Coal Company, 18 Fed. (Ind.) 839 (1923) upheld the Hitchman case and enjoined union organizers from organizing employees working under Yellow Dog Contracts. The decision in this case was written by Judge Parker, and it was this decision which rendered Judge Parker's candidacy for

the Supreme Court bench so repugnant to the laboring interests and ultimately caused his defeat.

By 1923, however, the growing resentment against the attitude the courts were maintaining toward the Yellow Dog Contract found judicial expression in the *LaFrance vs. Brotherhood of Electrical Workers*, case, 140 N.E. 899, in which the Ohio Supreme Court refused to enjoin union organizers from organizing men working under Yellow Dog Contracts. The court said: "It is difficult upon principle to see how persuading a man to do a thing, which he may do himself and with perfect legality, can be illegal. If it is legal for a workman to leave his employment at any time, how can it be illegal for a person to suggest to the workman, or to discuss with him, the advisability of his leaving his employment at any time?"

This case began a new and conflicting line of cases. It was followed by the first of the celebrated New York cases, *Reed Company vs. Whiteman*, 144 N.E. 885 (1924) in which an injunction restraining union organizers from inducing the plaintiff's employees "to breach any contract of employment between such workers and the plaintiff" was changed to one restraining them from inducing such employees to leave their employment before the expiration of their contract of employment. The employees could, thus, be approached before and persuaded to join the union upon the expiration of their contracts.

Exchange Bakery vs. Rifkin, 157 N.E. 130, the second of the New York cases, refused an injunction to restrain the defendant from organizing the plaintiff's employees, who were working under Yellow Dog Contracts, on the grounds that the contracts were "at will" and, since there was no express consideration for the promises not join any union, the contracts were inequitable. More important than the decision proper, however, was the dicta which stated: "Whatever rule we may finally adopt, there is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to extend its influence." With this single decisive sentence the *Hitchman* and *Red Jacket* cases were dismissed and swept aside as unimportant precedents.

Interborough Rapid Transit Co. 1.: *Lavin*, 247 N.Y. 65, and *Interborough Rapid Transit Co. vs. Green*, 227 N.Y.S. 258, are the most recent of the New York cases. The employees of the plaintiff were required to be members of a company union to join which the constitution required each member to swear "that I will not in any manner become identified with the Amalgamated Association of Street and Electric Railroad Workers of America." The defendants *Lavin* and others attempted to solicit members for the aforesaid association, and

the plaintiff sought an injunction to restrain them from such soliciting. The injunction was denied on the ground that, since the contracts of employment were "at will" the promises not to join the defendants union were not a part of a definite contract and lacked consideration. The court said. "Though the plaintiff's employees are prohibited by the plaintiff from joining that association or union, the union may, despite the prohibition, attempt to recruit its membership from those employees at least where the prohibition is not a part of a contract of employment for a definite term."

After this decision was rendered, the Interborough Company tried to get around it by having its employees sign definite contracts of employment to work for two years and refrain from joining the union. The company retained the right to discharge employees at any time because of incompetency, drunkenness, business depression, etc. When the American Federation of Labor continued to approach its employees, the company sought an injunction. The injunction was denied, the court holding that a contract of employment prohibiting the employees from joining any labor organization, giving the employer unlimited right to discharge and binding the employee to work for two years without binding the employer to hire him for two years is inequitable.

To sum up, the New York courts have not declared the Yellow Dog Contract, in itself, illegal, but merely have refused to enforce those contracts which were "at will" and those written contracts which involved certain inequitable arrangements. However, the general tone of their decisions and their tendency to cast aside precedents and to devote themselves exclusively to the facts of each individual case indicate that the chances are strong, indeed of their eventually declaring the Yellow Dog Contract illegal.

It must be remembered, however, that the *Hitchman and Red Jacket* cases, and not the New York cases, are still the law of the land. It must be remembered that, despite the fact that the New York cases are in conflict with the Hitchman case, they have never been appealed to the United States Supreme Court. Inasmuch as they must someday be reviewed by that tribunal, it will be interesting, indeed, to observe how the judges have reacted to the defeat of Judge Parker and to see whether they will reverse these decisions or whether they will uphold them and thus pave the way for the complete breakdown of the Hitchman rule.

Those people who are discouraged by the slow progress being made in fighting the Yellow Dog Contract look hopefully to the legislatures, expecting them to do in a few weeks that which it will take the courts decades to do, and this brings me to the second part of my subject. To these people it is a matter of vital importance whether or not the

Yellow Dog Contract can be legislated out of existence. According to all established precedents, it cannot. In the *Adair* case the Supreme Court said: "The right of the employee to quit the services of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. * * * In all such particulars the employer and employee have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

There is always a possibility, however, of precedents being disregarded and new precedents being made. This is particularly true in regard to the Wisconsin law due to certain features in the law which differentiate it from the previous laws which have been passed and declared unconstitutional. This law (103.42 ST. 1929) states that every "contract or agreement of hiring or employment between any employer and employee or prospective employee whereby either party to such a contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any organization of employers or either party such to such a contract or agreement, undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes or remains, a member of any labor organization or of any organization of employers * * * is hereby declared to be contrary to public policy and wholly void."

It will be noted, first of all, that this law does not declare it a criminal offense to make a Yellow Dog Contract, like all former laws have done, but merely states that such a contract is unenforceable. Then too, the law seeks to set up an equality of rights between the employer and employee, by declaring invalid not only Yellow Dog Contracts but also all contract which forbid the employer from joining any association of employers. That this equality of right is only nominal is apparent, but, viewed from the standpoint of the workman, the equality of rights referred to in the *Adair* case is also only nominal.

Twenty-eight years ago in the case, *Kreutzberg vs. State*, 114 Wis. 530, a Wisconsin Law forbidding Yellow Dog Contracts (ch. 332, 1899) was declared unconstitutional by the Wisconsin Supreme Court. Today Wisconsin has a somewhat revised Yellow Dog Contract law (103.42. st., 1929) in its statute book. Whether it remains there or not is problematical, but constitutional or unconstitutional, the Wisconsin Law is expressive of a constantly growing reaction, against the Yellow Dog Contract among the people of this country. As such, we cannot overestimate its importance.

CHARLES ROWAN.

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By the time this copy reaches you, a new Staff will have been elected to succeed the present one. The present Staff therefore, takes this opportunity of thanking the subscribers to the REVIEW for the hearty co-operation they have given the Staff during its term in office.

The pages of the REVIEW have been devoted largely to the discussion of timely legal subjects which have been deemed of interest to the practicing lawyer and student of the law. It is hoped that these subjects have proven valuable in their application to cases coming up in every day practise. The Staff again thanks the subscribers to the REVIEW one and all, for their kindly consideration and helpful suggestions to make the REVIEW successful.

C. F. Z.